SOONLY LIMES FACTORY SDN BHD

v.

PENGARAH JABATAN PENGANGKUTAN NEGERI PERAK

HIGH COURT MALAYA, IPOH
MOHD AZMAN HUSIN J
[ORIGINATING SUMMONS NO: 24-837-2003]
6 APRIL 2006

CIVIL PROCEDURE: *Mode of commencement - Declaration, application for - Challenging decision of public authority - Application made under O. 15 r. 16 Rules of the High Court 1980 and s. 41 Specific Relief Act 1950 - Whether wrong mode of commencement - Rules of the High Court 1980, O. 53*

The plaintiff sought for declarations against the defendant public authority by filing an originating summons ('OS') under O. 15 r. 16 of the Rules of the High Court 1980 ('RHC') and s. 41 of the Specific Relief Act 1950. The defendant primarily sought to declare that the defendant had acted in excess of jurisdiction and *ultra vires* s. 17 of the Road Traffic Act 1987 in refusing to renew the road tax of the plaintiff's vehicle. The defendant raised a preliminary objection that the plaintiff should have proceeded by way of judicial review under O. 53 RHC and not in the manner in which this application was brought. Thus, leave was required.

Held (allowing preliminary objection and dismissing OS):

(1) Order 53 RHC as amended *vide* P.U. (A) 342/2000 provides a standard procedure for all actions involving the challenge of decisions made by a public authority. The court has wide powers to grant any relief or remedy under the amended O. 53 RHC. The amended O. 53 RHC restricts the scope of O. 15 r. 16 RHC in relation to an action challenging a decision made by a public authority. As the plaintiff's cause of action was grounded in public law and not private law, the plaintiff should have pursued his public law remedy through judicial review proceedings under O. 53 RHC. In *Ah San v. Majlis Bandaraya Ipoh*, it was held that the application for an order of mandamus was not properly made as no leave had been obtained under O. 53 r. 3 RHC and s. 25 of the Courts

of Judicature Act 1964 read with para. 1 of the schedule thereto. Hence, in the present case, leave must first be obtained. (para 5)

Case(s) referred to:

Ah San v. Majlis Bandaraya Ipoh [2005] 7 CLJ 472 HC ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***

Subramaniam Vythilingam v. The Human Right Commission of Malaysia (Suhakam) & Ors [2003] 6 CLJ 175 HC ***(refd)***

Teh Guan Teik v. IGP & Anor [1998] 3 CLJ 153 FC ***(refd)***

Zamrud Properties Sdn Bhd v. Pang Mooi Gard & Anor [1995] 5 MLJ 180 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25
Government Proceedings Act 1948, s. 29
Government Proceedings Act 1956, s. 29
Road Traffic Act 1987, s. 17
Rules of the High Court 1980, O. 15 r. 16, O. 53 r. 3
Specific Relief Act 1950, ss. 41, 54

For the plaintiff - M/s Bachan & Kartar
For the defendant - A-G's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Mohd Azman Husin J:

[1] The plaintiff filed an originating summons encl. 1 and sought the following declarations:

a. Satu deklarasi bahawa keengganan di bawah s. 17 Akta Pengangkutan Jalan 1987 yang digunakan sebagai asas untuk menolak permohonan plaintif untuk memperbaharui lesen kenderaan motoriori no. pendaftaran BEA 4560 adalah batal dan tidak sah dan tidak mempunyai efek undang-undang serta melampaui bidang kuasa (*ultra vires*) kuasa defendan;

b. Satu deklarasi bahawa defendan tidak mempunyai hak atau kuasa yang sah untuk menolak permohonan pengeluaran lesen (road tax) terhadap sebuah kenderaan motoriori atas alasan bahawa plaintif telah melakukan satu kesalahan di

bawah Kaedah 138 Kenderaan Motor (Pembinaan dan Pengunaan) 1959 kerana telah gagal mematuhi Kaedah 34 Kaedah Kenderaan Motor (Pembinaan dan Penggunaan) 1959;

c. Satu deklarasi bahawa plaintif berhak dikeluarkan lesen dan atau cukai jalan (road tax) oleh defendan untuk kenderaan motorlori No. BEA 4560 atas permohonan oleh plaintif;

d. Satu perintah bahawa kerugian yang dialami oleh plaintif ditaksirkan oleh Timbalan Pendaftar atau Penolong Kanan Pendaftar dan dibayar oleh defendan kepada plaintif;

e. Kos permohonan ini dibayar oleh defendan;

f. Lain-lain relif atau relif lanjutan yang dianggap adil dan berpatutan oleh Mahkamah Yang Mulia ini.

[2] Mr. Loh Choy Lee, the director of the plaintiff's company affirmed an affidavit on facts to support the application. The learned federal counsel who appeared for the defendant took up a preliminary objection contending that the manner in which this application was brought was itself improper.

The Preliminary Objection

[3] The learned federal counsel pointed out that new O. 53 of the RHC was the result of an amendment in the year 2000 made by the Rules Committee, adopting the inspiration from the amendment to the English O. 53. Under the old O. 53, the focus was not on procedure but the type of remedy. On the other hand, under the present O. 53, it provides one standard procedure for all actions involving the challenge of decisions made by the public authority. Rules (1) & (2) are specifically referred to all empowering statutory provisions allowing moulding of relief or remedy in the Schedule to the Courts of Judicature Act 1964 as well as specific provisions in the Specific Relief Act 1950. He contended that when plaintiff sought to establish a decision of a public authority infringed their right which they claimed a protection under public law, they must proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or else. Thus leave under new O. 53 is required.

The Plaintiff's Reply

[4] The summons filed by the plaintiff is not for judicial review under O. 53 of the RHC. It is under O. 15 r. 16 of the RHC and s. 41 of the Specific Relief Act. Thus no leave under O. 53 of the RHC is required and the said O. 53 does not apply to declaration as conclusively decided by the Federal Court in *Teh Guan Teik v. IGP & Anor* [1998] 3 CLJ 153.

[5] Court's Findings

1. Order 53 of the RHC was amended in 2000 and came into force on 22 September 2000 *vide* PU(A) 342/2000. It provides one standard procedure for all actions involving the challenge of decisions made by the public authority. See r. 2. I reproduce the new O. 53 of the RHC:

ORDER 53

APPLICATION FOR JUDICIAL REVIEW

scope (O. 53 r. 1) 1. (1) This order shall govern all applications seeking the relief specified in para. 1 of the schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

Application (O. 53 r. 2) 2. (1) An application for any of the reliefs specified in para. 1 of the Schedule to the courts of Judicature Act 1964 (other than an application for an ordermof *habeas corpus*) shall be in Form 11 lA.

(2) An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon hearing of an application for judicial review, the court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of njunction or monetary compensation:

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of s. 29 of the Government Proceedings Act 1948 and s. 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Leave (O. 53 r. 3)

3. (1) No application under this order shall be made unless leave therefor has been granted in accordance with is rule.

(2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The Judge may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

Notice (O. 53 r. 4)

4. (1) Where leave has been granted under this rule, the applicant shall, within 14 days after the grant of such leave, file a notice in Form 111 B.

(2) Upon extraction of the sealed copy of Form 111 B the applicant shall serve a copy of the same together with a copy of the statement and all affidavits in support

on all persons directly affected by the application not later than 14 days before the date of hearing specified in the said Form.

Damages (O. .53 r. 5)

5. (1) On an application for judicial review the court may, subject to para. (2), award damages to the applicant if:

(a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates; and

(b) the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

(2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading.

Discovery Etc. (O. 53 r. 6)

6. Within 14 days after leave has been granted, any party to an application for judicial review may apply to the Judge for discovery and inspection of documents pursuant to Order 24, to administer interrogatories pursuant to Order 26, or to cross-examine the deponent of any affidavit filed in support of or in opposition to the application pursuant to Order 38.

Amendment (O. 53 r. 7)

7. (1) The Judge may allow the statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application, and where the applicant intends to amend his statement or use further affidavits, he must immediately give notice of his intention and of any proposed amendment of his statement to every other party.

(2) Every party to the application must supply to any other party copies of the affidavits which he proposes to use at the hearing.

Others persons who may be heard (O. 53 r. 8)

8. (1) Upon the hearing of an application for judicial review, any person who desires to be heard in opposition to the application and appears to the Judge to be a proper person to be heard may be heard notwithstanding that he has not been served with the cause papers in the matter.

(2) Where on application for judicial review, an order of *certiorari* is made in any such case the order shall direct that the proceedings shall be quashed forthwith on their removal to the High Court.

No setting Aside of Order (O. 53 r. 9)

9. No application to set aside any order made by the Judge shall be entertained, but the aggrieved party may appeal to the Court of Appeal.

2. Declarations a and b are sought on the ground that the defendant (a public authority) had excess of jurisdiction and acted *ultra vires* s. 17 of the Road Traffic Act 1987 in refusing to renew road tax of the plaintiff's vehicle bearing registration number BEA 4560. It is plaintiffs public law rights in relation to the public law decision made by the defendant.

3. Declaration c is sought to compel the defendant to issue road tax. To my mind, it is injunction type which is not allowed under the law to issue against the government based on s. 29 of the Government Proceedings Act 1956. Decision of case of *Zamrud Properties Sdn. Bhd. v. Pang Mooi Gard & Anor* [1995] 5 MLJ 180 is followed.

4. The court has wide power under O. 53 to grant any relief or remedy as affirmed by Court of Appeal in the case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697. "Order 53 in its present form was introduced to cure the mischief of its precursor which was much narrower and more restrictive."

5. Federal Court case of *Teh Guan Teik v. IGP & Anor* [1998] 3 MLJ 137 can be distinguished as it was decided in 1998 before new O. 53 came into force on 22 September 2000. New O. 53 is to include specific remedy and procedure for judicial review.

6. I am of the view that the amendment of O. 53 restricts the scope of O. 15 r. 16 of the RHC in relation to action challenging a decision made by any public authority. The power of the court under new O. 53 is now wider, practical and acceptable.

A 7. The plaintiff's cause of action is ground in public law not on private law. The plaintiff should have pursued his public law remedy through judicial review proceedings under O. 53 of the RHC and not by way of an Originating Summons. See *Subramaniam Vythilingam v. The Human Right Commission* B *of Malaysia (Suhakam) & Ors* [2003] 6 CLJ 175.

8. In *Ah San v. Majlis Bandaraya Ipoh* [2005] 7 CLJ 472, it was held that the application for an order of *mandamus* was not properly made as no leave had been obtained as provided C under O. 53 r. 3 of the RHC and s. 25 read with para. 1 of the schedule to the Courts of Judicature Act 1964. The decision is followed.

9. I am of the view that the plaintiff must proceed by way of judicial review which the plaintiff sought to establish a decision D of a public authority infringed its right and claimed a protection under public law. Hence, leave must first be obtained.

[6] In the circumstances, I uphold the preliminary objection of E the defendant and accordingly dismiss this originating summons encl. 1 with costs.

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